ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	

REPLY OF BELLSOUTH, SBC, AND VERIZON

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Opponents of the Joint Petition advance various procedural and substantive challenges to our showing that requesting carriers are not impaired without access to unbundled high-capacity loops and dedicated transport. Their claims are baseless. Mandatory unbundling of these UNEs is inconsistent with the Act and should be promptly eliminated.

I. INTRODUCTION AND SUMMARY

In the seventeen years since divestiture, the Commission has, on a number of occasions, reduced regulation in response to the growth of competition. In every instance, it has done so over the objections of the carriers that benefited most from the status quo, which denied that there was sufficient competition to justify the measures taken and claimed that the "sky would fall" if the Commission relied more on the market and less on regulation. In every instance, the naysayers were proved wrong and the Commission was proved right.

The scene is being re-enacted yet again. Special access, dedicated transport, and high-capacity loops undeniably are subject to substantial facilities-based competition –

competition that cannot be squared with a finding of impairment. Yet CLECs who desire low-cost UNEs claim otherwise and contend that, if they actually have to compete using their own facilities (as they have been doing for the past five years, and in some cases longer), the sky will fall.

The Commission should not be swayed by these assertions; the facts speak for themselves. Special access competition has been around for almost twenty years, during which time CLECs have become a potent competitive force, with some seven billion dollars in annual revenues and a market share of 36 percent.[1] In fact, CLEC special access competition is so prevalent and effective that markets generating 80 percent of BOC special access revenue qualify for Phase I pricing flexibility and markets generating nearly two-thirds of such revenues qualify for Phase II relief.

The competitive picture for dedicated transport and high-capacity loops is also bright. CLECs already have built 218,000 local fiber miles and 635 fiber networks in the top 150 MSAs. The densest MSAs often have fifteen or more competing fiber networks, many other MSAs have between five and fourteen such networks, and 77 of the top 100 have at least three.

Competition in dedicated transport is underscored by the fact that, to date, CLECs have collocated in a vast number of ILEC central offices – several tens of thousand

[1] Sources for all figures cited in this Introduction and Summary are contained herein.

nationwide, which serve at least three-quarters of all business lines and, undoubtedly, an even larger proportion of business revenues.[2]

Importantly, though, the CLECs' networks do not simply connect to ILEC central offices – they connect directly to buildings in which there is demand for high capacity services, as is evidenced by the fact that their fiber networks run pervasively through the areas where special access and high-capacity users are concentrated. By their own accounts, they already connect to commercial office buildings accounting for some 20 million business access lines (roughly one-third of the national total), and they are adding new locations daily. Indeed, a recent survey reported that 80 percent of commercial building owners said they had more than one telecommunications provider, and almost 60 percent offer their tenants a choice of three or more. It is no wonder, then, that CLECs have captured more than 20 percent (or more) of the business market nationally and an even higher percent in many areas – and that they generally serve those customers using their own facilities.[3]

This marketplace evidence – which is "the most persuasive evidence of alternatives as a practical, economic, and operational matter"[4] – establishes a compelling, *prima facie* case that the Section 251(d)(2) impairment test is not met for high capacity loops and dedicated transport. As the Supreme Court has warned, the Commission

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[2] *See* M.J. Balhoff, Legg Mason Wood Walker, Investext Report No. 2022195, "Telecom Services: Industry Update" (Dec. 6, 1999), at Table 10 (72 percent of business lines were served by central offices with at least one collocator).

[3] The Commission's latest Local Competition Report reveals that CLECs serve approximately 35 percent of their total customer base over their own facilities. The number undoubtedly is significantly higher for business customers, since many residential customers are served through the UNE platform or traditional resale.

[4] UNE Remand Order, ¶ 66.

cannot mandate access to a UNE just because a CLEC has requested such access – doing so "allows entrants, rather than the Commission, to determine ... whether the failure to obtain access ... would impair the ability to provide service."[5] Moreover, as Chairman Powell has recognized, "[t]he regulators' rush to lend a helping hand at the first sign of anxiety has proven, so often, to be more disruptive and counter-productive than the converse. ... [A]nyone advocating the extension or intrusion of regulation into such a vibrant market bears a heavy burden of proving that the *public*, as opposed to firms with a particular business plan, will likely be harmed, absent doing so."[6]

The CLECs have failed miserably to carry that burden. They have made no comprehensive showing of their own – they have provided no fiber maps, no deployment plans, no lists of buildings served, and no investment models – choosing instead to rely on anecdotal claims of impairment, nitpick at our data, and, of course, to resurrect the tradition of claiming that the sky will fall if the Commission reduces its regulatory requirements. These attempts to obscure the hard evidence are unavailing.

Indeed, underlying the claims that CLECs remain dependent on ILEC dedicated transport and high-capacity loops are some revealing concessions that further bolster our case. Covad, for example, obtains more than half of its dedicated transport from non-ILEC sources – not only in downtown business areas, but across the hundreds of wire centers in which it has collocated.[7] NexTel gets almost one-third of its DS3s from non-

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[5] AT&T v. Iowa Util. Bd., 525 U.S. 366, 389 (1999).

[6] Statement of Commissioner Powell before the Senate Committee on Commerce, Science and Development, May 26, 1999. This statement was made in the context of regulating Internet-related services, but applies as well to the vibrantly competitive services at issue here.

[7] Covad 10, Shipley/Chang Decl. Table 1

ILEC sources – again, in locations that generally are far removed from major business centers. Penn Telecom apparently obtains almost half of its high-capacity loops from *non*-ILEC sources.[8] And a multitude of commenters grudgingly admit that alternative facilities abound in many metropolitan areas.[9] While various commenters allege that they use ILEC facilities the vast majority of the time, they do not disclose the percent of revenues served by competitive facilities (which is likely to be far greater than the raw percentage of circuits obtained from non-ILEC sources) and their numbers are generally incomplete or unsupported.

As these examples further confirm, competitors have deployed their own dedicated transport and high-capacity loops[10] in a variety of geographic locations – areas that account for the vast majority of demand.[11] The CLECs cannot ignore this evidence simply by claiming that "nothing has changed" since the UNE Remand Order.[12] Contrary to those claims, there has been substantial growth in the number of local fiber

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[8] Penn Telecom at 6 n.12.

[9] *See, e.g.* MPower, Ankum Decl. 16 ("The fact that there is competition for large customers ... in no way demonstrates that there is competition in a large geographic area."); AES Communications 6; CTC/Weikle Decl. ¶¶ 9-10; Penn Telecom 6.

[10] The Joint Petition defined high-capacity loops as those with DS-1 or greater capacity (by clear implication including dark fiber loops), and dedicated transport as including both the transport architectures described in 47 C.F.R. § 51.319(d)(1)(i) and dark fiber transport as defined in 47 C.F.R. § 51.319(d)(1)(ii). We clarify here that (1) we intend dedicated transport also to encompass only DS-1 and above levels of capacity, and (2) we do not include in high-capacity loops xDSL services provided over voice grade (2-wire) facilities. These clarifications should address concerns regarding the effect of the requested relief on line-sharing and DSL competition.

[11] Demand for services using these facilities is highly concentrated, with roughly 20 percent of wire centers accounting for 80 percent or more of revenues. Joint Petition 11.

[12] *See, e.g.*, Allegiance/Focal 13-17, XO 3-6. Although the Joint Petitioners believe that the UNE Remand Order arbitrarily failed to consider evidence of substantial deployment

networks, collocation hotels, fiber miles, and buildings served by CLECs in the almost two years since that Order was adopted, and a wholesale market for these facilities has developed. The extent of existing deployment of competitive facilities, in short, compels a finding that competing providers of special access, transport services, and high-capacity loops or channel terminations are not impaired without access to these ILEC UNEs.

Supplementing this evidence, Dr. Crandall's Declaration demonstrates that CLEC facilities already exist close to locations housing businesses that account for the vast majority of demand for dedicated transport, high-capacity loops, and special access services. Given the proximity of these facilities and the pattern of extensions that CLECs already have made, Dr. Crandall shows that it would be economically rational for CLECs to continue building out to additional end user locations. Moreover, as CLECs continue to build out their networks to these locations, it will become feasible for them to extend them further, to serve additional locations.[13] This finding confirms the Chairman's judgment that deployment of alternative facilities by some CLECs in some locations "strongly suggests" that competitors "are not significantly impaired," both in areas where they have deployed "and in areas in which they have not done so."[14] It also validates Congress's recognition that the local phone network is not a natural monopoly – that "meaningful facilities-based competition is possible."[15]

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of alternative facilities, the Petition accepts as a given the conclusions reached in that Order and presents evidence of significant increases in those facilities in the interim.

[13] If it turns out that CLECs cannot deploy alternative facilities to serve some small fraction of demand for these services, the Commission cannot lawfully or logically use that eventuality to mandate continued, across-the-board unbundling.

[14] *See* 1999 FCC LEXIS 5663 at **49.

[15] S. Conf. Rep. No. 104-230, at 148 (1996).

Put another way, the competitive situation today is a point on an ascending curve of alternative local facilities deployment, not the peak (and far from it). CLECs can and will continue to deploy competitive local transport and high-capacity loop facilities in a timely and cost-effective manner, assuming rational policies that motivate sustainable, facilities-based competition. Indeed, any perceived shortage of alternative facilities today reflects regulations that "probably bent a little more in the direction of resale than facilities because everybody was really anxious to get competition."[16] Correcting this bias – by declining to mandate access to facilities, such as dedicated transport and high-capacity loops, for which alternatives can and do exist – will go a long way toward assuring that competition continues to expand and intensify.

Notwithstanding the abundant evidence of competition in the provision of dedicated transport and high-capacity loops, our opponents contend that these network elements must continue to be unbundled everywhere as long as any CLEC, anywhere, believes that it cannot provide service effectively without using the ILECs' facilities. For example, Allegiance and Focal – each of which has deployed thousands of miles of local fiber – argue that, "unless and until multiple competitive fiber providers are *ubiquitously* collocated in *every* incumbent LEC central office, the Commission cannot remove transport from the list of UNEs."[17] Similarly, Yipes suggests that deployment of alternative facilities by some CLECs – even many CLECs – is consistent with a finding of impairment with respect to other CLECs: "a finding of [non]-impairment requires

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[16] "Powell Blames CLEC Money Woes on Lenders, Bad Business Plans," Communications Daily, May 23, 2001, at 4 ("Bad Business Plans").

[17] Allegiance/Focal 24 (emphasis in original).

more than a showing that one or more competitive providers have been able to self-provision an alternative to ILEC-provided high-capacity loops and/or dedicated fiber."[18]

These interpretations cannot be reconciled with the "limiting standard" that the Supreme Court admonished the Commission to apply in interpreting Section 251(d)(2).[19] Moreover, heeding these interpretations would sharply constrain additional deployment of competitive facilities, contrary to Congress's and the Commission's judgment that facilities-based competition is not only possible, but preferable to competition based on continued reliance on the ILECs' own facilities.[20] As WorldCom admits,[21] CLECs will not build out their networks as much as they otherwise would, as long as UNEs remain available at prices that are below the incremental costs of deploying facilities – the very costs that the Commission's TELRIC model is supposed to estimate. The Commission's course therefore is clear: it must remove dedicated transport and high-capacity loops from the UNE "list."

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[18] Yipes 11.

[19] AT&T v. Iowa Util. Bd., 525 U.S. at 388.

[20] *See* UNE Remand Order, ¶ 7 ("[I]t is only through owning and operating their own facilities that competitors have control over the competitive and operational characteristics of their service, and have the incentive to invest and innovate in new technologies ....").

[21] WorldCom 11.

II. THE SHOTGUN BLASTS LEVELED AT THE PETITION BY AT&T AND OTHERS ARE WELL WIDE OF THE MARK AND MUST NOT DISTRACT THE COMMISSION FROM THE PREVALENCE OF ALTERNATIVE FACILITIES AND THE INTENSITY OF COMPETITION.

Given the endless parade of obstacles to competition trotted out by the CLECs – greedy landlords, molasses-laden municipal franchise approval processes, untrusting customers, capricious capital markets, and, of course, recalcitrant ILECs, among other things – it is quite remarkable that any CLEC, anywhere, has deployed even a single strand of fiber. The Commission must not allow itself to be swayed by the rabid rhetoric of our opponents. How, after all, have CLECs managed to gain more than twenty percent of the business market in so many areas, not to mention more than one-third of all special access revenues? How have they invested tens of billions of dollars in their local networks? How have they secured access rights and deployed facilities to commercial office buildings housing some 20 million business access lines?[22] How are they continuing to extend their local networks to new locations every day? How have they implemented tens of thousands of collocation arrangements in central offices serving the vast majority of ILEC customers? And how have they laid more than 200,000 miles of local fiber in cities and towns around the country?

[22] *See* Rebuttal Report Regarding Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport (June 25, 2001) ("Rebuttal Fact Report") at 11, citing the web site of the CLEC-sponsored Smart Buildings Policy Project. The Rebuttal Fact Report is provided as Attachment A hereto.

The sky is not falling. Competitive providers of special access, dedicated transport, high-capacity loops, and channel terminations are alive, well, and growing.[23] Their number includes not just giant competitors such as AT&T, WorldCom, and Sprint, but entities backed by the financial might of the nation's leading media company (Time Warner Telecom) and affiliates of various energy conglomerates, as well as well-funded new entrants such as Allegiance.

Why do these companies so vehemently attack our Petition? The answer is simple: it would deny them a massive arbitrage opportunity – the ability to use ILEC dedicated transport and high-capacity loop UNEs at bargain basement rates, in lieu of their own facilities or competitively provided special access services. In an effort to preserve that opportunity, they throw every conceivable argument at the Commission, regardless of their individual and cumulative lack of merit. No fact is too well-established to distort, no inconvenience is too small to magnify into an insurmountable barrier, and no theory is too preposterous to propound.

The Commission must not let these efforts succeed. As shown below, upon dispersing the smoke and shattering the fun-house mirrors, the Commission is left with a clear picture of vigorous, effective competition by facilities-based CLECs who do not need, and are not statutorily entitled to, continued compulsory access to ILEC dedicated transport and high-capacity loop UNEs.

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[23] *See, e.g.*, W. Weinberg & C. Ransford, "The Death of the CLEC ... Has Been Greatly Exaggerated," *Telephony*, March 12, 2001 ("the CLEC market is growing. Total revenues have increased 34% from 1999 to 2000, and CLECs now serve more than 16 million access lines." In nascent industries, fluctuations in capital markets are "to be expected. However, a corrective period does not doom the sector – quite the contrary.

First, notwithstanding the ferocity of their attacks on the Fact Report and Dr. Crandall's Declaration, AT&T and WorldCom have failed to draw blood. The facts in the Report are independently verifiable – indeed, in other proceedings, the CLECs' principal trade association and AT&T and WorldCom themselves have regularly cited to the New Paradigm study (on which portions of the Fact Report are based) when it suits their purposes to do so. The analysis is sound; the various methodological flaws supposedly identified by our opponents are fictitious and/or inconsequential. The Fact Report, at bottom, presents a reliable, overall assessment of the extent of competition in the provision of special access service, dedicated transport, and high-capacity loops.[24]

Second, the assault on Dr. Crandall's Declaration is equally off target.[25] His Declaration is not an abstract, theoretical exercise; it is based on verifiable data of actual, existing competition obtained from independent sources – data that our opponents do not and cannot refute. Those data alone compel the conclusion that requesting carriers are not impaired without access to unbundled dedicated transport and high-capacity loops. The only aspect of Dr. Crandall's Declaration that relies on economic analysis rather than a simple observation of existing facts is his extrapolation from those data to determine (using conservative assumptions and mainstream statistical analysis) under what circumstances CLECs can economically build out loop facilities to customers. We cannot be faulted for introducing the model when CLECs claim, no matter how much

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Instead, the individual failures of a select number of CLECs will ultimately lead to a stronger, more robust and increasingly innovative industry.").

[24] *See* section IV.A, *infra* and the Rebuttal Fact Report for an explanation of why the opponents' claims are either wrong or irrelevant.

[25] For a rebuttal of these attacks, see section IV.B, *infra* and the Rebuttal Declaration of Dr. Crandall ("Crandall Rebuttal Decl.") (Attachment B hereto).

evidence of actual competitive deployment we submit, that there is no guarantee that existing facilities will be expanded, or indeed, used to serve end user customers at all.[26] Finally, the opponents' substantive complaints about his Declaration mischaracterize the measures used to portray actual and potential competition, employ unreasonable statistical inferences, and fail to rebut the merits of the breakeven model's methodology and results.

Third, basing impairment claims on a comparison of the cost of a UNE to the cost of building or obtaining a comparable element from another source (as our opponents urge) is contrary to the Supreme Court's warning that cost differentials alone do not demonstrate impairment.[27] The relevant inquiry is whether CLECs economically can serve customers without using an ILEC's UNEs – which is answered affirmatively by both marketplace evidence and Dr. Crandall's Declaration – not whether a CLEC could make more money if it used UNEs instead of deploying its own facilities, using a third-party's alternative, or purchasing special access from the ILEC.

Indeed, claims that CLECs cannot self-provide these facilities or obtain them from third parties at a cost equal to TELRIC-priced UNEs confirm that TELRIC rates are unreasonably low. After all, under the FCC's interpretation, TELRIC is supposed to reveal the costs of a new, efficiently deployed network. CLEC deployment of these facilities is the ultimate "green field" network, and therefore the real world costs they incur better reflect TELRIC than does any hypothetical cost model.

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[26] *See* Crandall Rebuttal Decl., ¶ 8.

[27] Iowa Util. Bd., 525 U.S. at 390 & n.11; *see also* GTE Service Corp. v. FCC, 205 F.3d 416, 424 (D.C. Cir. 2000) (stating that a rationale for unbundling "based on presumed cost savings" was "flatly rejected" by the Supreme Court).

Fourth, objections that competitors cannot deploy facilities in a timely manner because of franchise negotiations, building access delays, and the like are not well-taken. Identical claims were raised when the record of the UNE Remand Order was compiled; in the intervening two years, competitors have laid tens of thousand of additional miles of local fiber and gained access to tens of thousands of additional buildings. At some point – which has already been reached – the Commission needs to look skeptically at claims that delay is a significant competitive impediment. In any event, the various sources of delay cited by the CLECs are overstated and, as explained herein, do not amount to impairment.[28] The Commission also should recognize that, even where a CLEC would face a delay of several months deploying its own facilities, it can purchase competitively priced ILEC special access services on a transitional, month-to-month basis while it builds out its own facilities, rather than using UNEs. Once again, a cost difference between special access and UNEs does not automatically amount to impairment; in fact, compelling the interim use of special access rather than UNEs should promote more efficient entry since special access rates are market-based rather than derived from hypothetical costs determined in a regulatory proceeding.

Fifth, the fact that some CLECs have entered bankruptcy is irrelevant to this proceeding. Such consolidation is typical of new industries, and is due in large part to business strategies that were based on untenable, short-term arbitrage opportunities.[29]

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[28] Indeed, the impairment analysis under Section 251(d)(2) properly should consider only those factors that are intrinsically related to the building of alternative *facilities*. UNEs, after all, are defined as "facilities or equipment." 47 U.S.C. § 153(29). Factors that are simply part of building a *business* – not of building alternatives to the ILECs' network elements – should not be considered.

[29] Bad Business Plans, *supra*, at 3-4.

Even if the currently bankrupt CLECs go out of business (most are in Chapter 11, not Chapter 7), their facilities, being sunk, would remain available for use by other competitors. As the Commission has pointed out:

> Investment in facilities, particularly those that cannot be used for another purpose, is an important indicator of ... irreversible entry. If a competitive LEC has made a substantial sunk investment in equipment, that equipment remains available and capable for providing service in competition with the incumbent .... Another firm can buy the facilities ... and ... will be able to compete with the incumbent LEC.[30]

Nor have the capital markets stopped funding CLECs, as our opponents would have the Commission believe. The level of funding has decreased for some CLECs (particularly those with weak business plans), but CLECs continue to receive hundreds of millions of dollars in new investments and continue to expand their networks.[31] In fact, CLECs are expected to pour an additional $6.8 billion into their networks in 2001 – a marked decrease from 2000, to be sure, but still more than the $6.02 billion they invested in 1999.[32] Indeed, the tightening of the capital markets makes it more imperative than ever that the Commission adopt policies that encourage viable, long-term entry based on deployment of alternative facilities. As the capital markets more carefully scrutinize business plans, facilities-based entrants should not be undercut by companies that wish to perpetuate reliance on ILEC facilities. Continuing to encourage such reliance would

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[30] *See* Access Charge Reform, 14 FCC Rcd 14221, 14264 (1999).

[31] Moreover, many CLECs enjoy per-line valuations significantly higher than those of the RBOCs, which is particularly impressive given that the RBOCs' valuations contain non-wireline assets and foreign holdings, not just basic local phone service. *See* Crandall Rebuttal Decl., note 78.

[32] Credit Suisse First Boston, "Telecom Services – CLECs," at 25 (June 5, 2001) ("CSFB CLEC Report"). The CSFB CLEC Report states that CLECs invested $12.682 billion in their networks in 2000.

only increase hesitance to fund deployment of competing facilities by increasing their investment risk.

Sixth, as demonstrated in our Opposition to NewSouth's motion to dismiss, the Joint Petition is consistent with the review process set forth in the UNE Remand Order and the Commission's Rules. The Commission did not establish a three-year "quiet period" during which the UNE list would be frozen[33]; nor could it have done so consistent with the Communications Act and fundamental principles of administrative law. Moreover, the Joint Petition satisfies all the substantive requirements for a petition for rulemaking.

To assure compliance with the Act and create appropriate incentives for viable, facilities-based competition, the Commission should promptly grant the Joint Petition.

III. OUR OPPONENTS BASE THEIR CHALLENGE TO THE JOINT PETITION ON AN UNLAWFUL INTERPRETATION OF "UBIQUITY."

The Supreme Court's command with respect to unbundling is clear: The Commission must interpret the impairment standard in Section 251(d)(2) "to apply *some* limiting standard, rationally related to the goals of the Act."[34] It cannot order universal unbundling of a network element – or mandate continued unbundling of that element – just because some CLEC in some location asserts that it would be impaired without

[33] The Commission said only that it "expect[ed] to reexamine our national list ... every three years." UNE Remand Order, ¶ 150. As explained in Section X, *infra*, the Commission has not treated such formulations as mandatory.

[34] Iowa Util. Bd., 525 U.S. at 388.

access.[35] Nor may it compel unbundling just because alternative sources of supply would cause "*any* increase in cost" or decrease in quality compared to use of a UNE.[36]

The opponents of the Joint Petition nonetheless assert that impairment exists unless there are multiple sources of alternative facilities available in every wire center.[37] In doing so, they cite to a passage in the UNE Remand Order requiring that alternatives to the relevant ILEC UNE be "ubiquitous."[38] For two reasons, the CLECs' unrealistic (and intentionally unattainable) showing cannot be squared with the Act. First, the CLECs' standard would assure unlimited, unending unbundling, rendering the statutory limitations meaningless – precisely the result rejected by the Supreme Court. Indeed, the Commission already has declined to accept such an interpretation in placing limits on the availability of unbundled switching; in doing so, it recognized that alternative sources for switching are available for providing service to customers with four or more lines in

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[35] Doing so would impermissibly "allow entrants, rather than the Commission, to determine" whether the impairment standard is met. *Id.*, 525 U.S. at 389.

[36] *Id.* at 389-90.

[37] *See, e.g.*, Allegiance/Focal 24.

[38] *See, e.g*, WorldCom 14-15; CompTel 11; Covad 7-9. The CLECs also make much of that fact that – based on a record that is now more than two years old – the UNE Remand Order determined that alternatives for dedicated transport and high-capacity loops are available only on "limited, point-to-point routes." *See, e.g.*, El Paso/Global Broadband 7-8; Covad 4; Allegiance/Focal 13-17; XO 3-6. Their assertion that nothing has changed (and their related claim that the Joint Petition is an untimely petition for reconsideration of the UNE Remand Order) is baseless. While the Joint Petitioners do not agree with the UNE Remand Order in this regard, the Joint Petition takes those findings as a given but demonstrates that there has been significant deployment of alternative facilities in the interim, requiring a no-impairment finding even under the analytical framework adopted in that decision.

certain areas.[39] Second, that standard would make sense, if at all, only if the local telephone network were a natural monopoly. (Indeed, the CLECs' standard would virtually assure such a result in many areas, since it would undermine investment incentives.) Both Congress and the Commission, however, have expressly rejected this premise. In passing the Telecom Act, Congress well understood that facilities-based competition is both possible and preferable to continued reliance on the incumbent's network – that, as noted by the Commission, "it is the development of facilities-based competition that will provide both incumbent and competitive LECs with the incentives to innovate and invest in new technologies."[40]

To stay true to that vision, the Commission must recognize that competitors are not impaired everywhere even if they had carried their burden of proving that there is some small pocket of demand that cannot immediately be served through alternative facilities. As the Joint Petition demonstrates – and as several CLECs concede – demand for services using dedicated transport and high-capacity loops is highly concentrated, with 20 percent of ILEC wire centers accounting for roughly 80 percent of revenues for such services. Moreover, the vast majority of customers for these services are sophisticated, large businesses (including IXCs). And, as CLECs extend their networks, previously remote locations will become closer and the costs of serving additional customers will be correspondingly reduced. The impairment standard cannot mean that

[39] We continue to believe that there is no basis for requiring switching to be unbundled at all, but use the Commission's treatment of switching to illustrate the flaws in the CLECs' interpretation of the impairment standard.

[40] UNE Remand Order, ¶ 104.

ILEC UNEs must remain available everywhere as long as there is any location that is not reached by CLEC alternatives.

Some commenters nonetheless argue that the concentration of demand for these elements does not diminish their reliance on ILEC facilities. These arguments are unavailing.

Dedicated transport. Several CLECs contend that they remain dependent on ILEC dedicated transport facilities (particularly between lower-volume end offices) and that the presence of a competitive alternative in one CO does not help unless that same competitor is collocated in a second CO where the CLEC wishes to route its traffic. There are at least five compelling reasons to reject this argument.

First, parties contending that they remain almost completely dependent on ILECs generally either make an unsupported assertion to this effect without giving any numbers, or they acknowledge that alternative sources of transport exist but fail to indicate the extent of those sources, simply claiming that they are unsuitable.[41] AT&T and WorldCom provide only incomplete data – they offer figures on the extent to which they self-supply transport but do not indicate how much transport they lease from non-ILEC sources (or, more importantly, how much more they could lease from such sources or self-supply).[42]

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[41] *See, e.g.*, NuVox Butler Decl. ¶¶ 9, 11; Cbeyond Markle Decl. ¶ 6; ATG Bowman Decl. ¶¶ 5-6 (conceding that it uses third parties for an undisclosed portion of its interoffice transport in Towson, Maryland, Portland, Oregon and Seattle, Washington).

[42] AT&T Fea/Taggart Decl. 3-4; WorldCom 16. AT&T at least discloses how often it obtains loops from third parties, but WorldCom does not.

Second, the CLECs' argument is contradicted by the record, which confirms that CLECs are using non-ILEC alternatives for dedicated transport in a wide number of locations – certainly more than the "limited point-to-point routes" referenced in the UNE Remand Order – notwithstanding their protests to the contrary. For example, Covad uses non-ILEC transport facilities to connect more than half of its collocation arrangements.[43] This is particularly notable because Covad expressly notes that it engages in "blanket collocation" – collocating in all wire centers in a serving area rather than just the densest ones.[44] ATG's SONET ring in Reno connects to five of the eight relevant Nevada Bell central offices.[45] NexTel uses non-ILEC sources for almost a third of its DS3 transport.[46] And McLeod uses non-ILEC transport for almost half of its transport in Flint and more than a third in Omaha.[47]

Third, because demand for dedicated transport is highly concentrated, the fact that competitive transport may be available today only between some, but not all, wire centers is, in itself, unrevealing. The important point is that competitive transport is available today between those wire centers accounting for the vast majority of demand for this service. (Notably, none of the CLECs, including AT&T and WorldCom, provides data regarding the percent of demand, as opposed to the percent of facilities, that is served through self-supply or facilities leased from non-ILEC sources.) Over time, with rational unbundling and pricing policies, such transport undoubtedly will continue to be deployed

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[43] Covad Shipley/Chang Decl. Table 1.

[44] Covad 10.

[45] ATG 5.

[46] NexTel Edgerly Decl. ¶ 4.

[47] McLeod 3.

in new locations. Competitors therefore would not be impaired if dedicated transport were taken off the UNE list.[48]

Fourth, no party has shown that collocation hotels do not reduce the need for collocation in ILEC central offices, and this contention is inherently incredible. The Commission should ask itself why these facilities have been proliferating so dramatically – their growth cannot be explained (even in substantial part) by the desire of CLECs to connect to IXCs and ISPs. Rather, they are used by CLECs to connect with other CLECs and with ILECs. Contrary to assertions by AT&T and others, using a collocation hotel does not necessarily require a CLEC to build facilities.[49] The operators of these hotels typically arrange for transport into numerous ILEC central offices. Thus, a CLEC collocating in multiple offices often can interconnect those locations indirectly through a collocation hotel if it does not wish to use ILEC special access.

Fifth, the apparent premise for the CLECs' argument is that they need to connect every CO to every other CO in a mesh architecture. That premise, however, does not describe real-world design of local exchange networks. ILEC central offices are not directly connected to all other ILEC central offices. ILECs predominantly use hub-and-spoke arrangements, as well as some direct connections, and CLECs do as well. It is therefore specious to argue that competitors require alternative dedicated transport facilities to each and every ILEC office in order to compete. They can and do get by quite well with far fewer facilities.

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[48] Moreover, unbundled DS-0 transport (and common/shared transport) would remain available even after grant of the Petition, as would special access.

[49] AT&T Pfau Decl. ¶ 35; IP 3.

High-capacity loops. Just as CLEC claims regarding dedicated transport are unavailing, so too are their claims with respect to high-capacity loops. There are considerable alternative sources of high-capacity loops.[50] The validity of this statement is confirmed by the fact that the CLEC-run Smart Buildings Policy Project acknowledges that CLECs already have deployed their own facilities to buildings accounting for one-third of the nation's 60 million business access lines. It is also confirmed by the Commission's own data, which show that CLECs self-provision about 35 percent of all access lines they serve.[51] Because CLECs are less likely to self-provision voice grade lines than high-capacity lines, they must self-provision more than 35 percent of their high-capacity loops.[52]

Moreover, the use of high-capacity loops to serve smaller businesses (which several CLECs claim as a reason for maintaining this UNE) must account for a very

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[50] Despite protests from certain CLECs, wireless loops also are a viable alternative to ILEC high-capacity loops. While WinStar and Teligent are having financial difficulties, even WorldCom concedes that their "failures do not prove that fixed wireless could never substitute for fiber." WorldCom 13-14. If those companies cease operations, other competitors are sure to acquire and operate their licenses and facilities. In addition, WorldCom's claim that its own MMDS offering is not a substitute for wireline DS-1 circuits is overstated. First, while WorldCom states that its MMDS service only provides 512 kbps upstream, it at least implies that the service can support a greater capacity downstream. Accordingly, it would be a viable substitute for many DS-1 applications. In addition, WorldCom's claims relate to the way it has chosen to configure its own service; there is nothing inherent in MMDS that prevents it from providing a DS-1 or greater level of capacity in both directions and it is, in fact, capable of higher transmission speeds. *See* Sean Buckley, "MMDS Hits the Airwaves," Telecommunications Online (Feb. 2001) (depending on architecture, "end users of [MMDS] will obtain speeds of 1 Mbps to 2 Mbps").

[51] "Local Telephone Competition: Status as of December 31, 2000," Industry Analysis Division, Common Carrier Bureau (May 2001), at 1.

[52] This is confirmed by the record as well. Penn Telecom, for example, states that it provides more than half of its high-cap loops over Verizon facilities, implying that almost

small portion of overall demand.[53] The Crandall Declaration already reflects the fact that some relatively small businesses may purchase services utilizing these facilities. It nonetheless demonstrates that, in the vast majority of cases, it is worthwhile for a CLEC to serve a dedicated transport or DS-1 customer using its own facilities. (The fact that smaller customers of these services may be located relatively far from downtown business areas is not dispositive of impairment, since the CSMG analysis shows that the costs of building out competitive facilities are not significantly distance-sensitive.) Accordingly, CLECs either have deployed or readily could deploy or procure competitive alternatives for the vast majority of their high-capacity loop customers. Even if there were a minority of customers for whom non-ILEC high-capacity loops could not economically be deployed, such circumstances cannot be used to justify a universal unbundling requirement for high-capacity loops. Not only is there no impairment with respect to such facilities generally, but there is arguably not even any impairment with respect to CLECs (if any) that focus on serving that small minority of customers. Such CLECs could serve these customers using unbundled DS-0 loops or special access DS-1 service (either from the ILEC or from competitive providers).

Under Congress's scheme, UNEs are to play a transitional role on the road to facilities-based competition.[54] The transition period is over with respect to dedicated

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half of those loops are provided over its own or third-party facilities. Penn Telecom at 6 n.12.

[53] *See, e.g.*, Conversent 7-8; Covad 10-12; McLeod 2-3; Broadslate et al., Declaration of Lisa Korner Butler, ¶ 6 (use DS1 loops for customers with 4 or more access lines); Yipes 17 (many small and medium businesses needs DS1); Allegiance/Focal 6.

[54] *See* UNE Remand Order, ¶ 52 ("The purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with